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Citations

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 884

UNITED MINE WORKERS OF AMERICA, DISTRICT 12
Petitioner

v.

ILLINOIS STATE BAR ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief *amicus curiae* in the instant case in support of the petition for a writ of certiorari, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the petitioner has been obtained. Counsel for respondent has refused his consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred twenty-nine affiliated labor organizations with a total membership of approximately thirteen million five hundred thousand. The question presented by the instant case is whether union members may further their undoubted constitutional right to associate for the purpose of preserving and enforcing their legal rights, *Brotherhood of Railroad Trainmen v*

Virginia, 377 U. S. 1 (1964), by voting to set up a plan whereby a portion of their union dues is earmarked to pay an attorney to advise and represent such of their number as need his services. As this case and the *Trainmen's Case* both indicate union members, affiliated with every segment of the labor movement, have traditionally been anxious to utilize their labor organizations as a base upon which to build improved methods of obtaining legal services, *see, e.g., "Committee Report on Group Legal Services"* 39 Cal. S.B.J. 669, 670-675 (1965) (survey of union legal assistance plans in California); N. Y. Times, April 10, 1965, p. 31, col. 2 (discussion of legal aid clinic established by the New York Hotel Trades Council). Moreover, as both these cases also indicate these efforts have met widespread resistance from both the American Bar Association and State Bar Associations, *see* the Petition for Rehearing in the *Trainmen's Case* filed by the ABA and 44 State Bar Associations. The Bar's efforts have naturally tended to limit the effectiveness and the growth of these union group legal service programs.

The AFL-CIO, as spokesman for the majority of American union members has a profound interest in seeing that the arbitrary and unwise restriction on the access of working men to effective counsel sought by the Bar and granted by the Illinois courts is set aside. For this reason it seeks leave to file a brief *amicus curiae* in order to acquaint the Court with the views of the labor movement as a whole as to why the petition for a writ of certiorari should be granted.

ISSUE NOT COVERED IN THE PETITION

The main portion of the petition filed in the instant case is devoted to demonstrating that the Illinois Supreme

Court's determination of the constitutional question presented is erroneous and in conflict with this Court's decisions in the *Trainmen's Case, supra,* 377 U.S. 1 and *N.A.A.C.P.* v *Button,* 371 U.S. 415 (1963) (Pet. 14-25). It mentions only in passing (Pet. 21-22) the serious consequences that the decision below will have on workers' ability to secure truly adequate legal representation We believe that recent legal and sociological commentary demonstrates beyond any reasonable doubt that the decision below will have an extremely deleterious effect on their ability to do so, and that it will be helpful to the Court to have the reasons for this belief developed. The accompanying brief is therefore addressed to that task.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompanying brief *amicus curiae* in the instant case in support of the petition for a writ of certiorari to the Supreme Court of the State of Illinois.

Respectfully submitted,

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ILLINOIS STATE BAR ASSOCIATION, ET AL.

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinion below, jurisdiction, questions presented, the constitutional and statutory provisions and canons of ethics involved are set out on pages 3-4, 20a-21a of the petition.

The interest of the AFL-CIO is set out on pp. iii-iv of the foregoing motion for leave to file a brief as *amicus curiae*.

REASONS FOR GRANTING THE WRIT

In essence the position of the AFL-CIO is that group legal service plans[1] set up by non-profit associations, which incorporate an insurance or cost-spreading principle are the only presently available feasible means of providing the average working man with the effective legal assistance he needs and that these plans present no inherent policy problems which make their operation contrary to the public interest.

1. It is now beyond dispute, by reason of the work of distinguished scholars over the past thirty years: first that in our rapidly changing complex, interdependent urban society working men and their families are encountering an ever wider variety of problems which the general polity has dealt with through formal regulation and which may therefore appropriately be denominated as "legal problems"; and second that because of the present structure of the American Bar, as governed by the prevailing canons and rules, in many cases the average worker is not being appraised of his legal rights in such fields as landlord and tenant, consumer credit and family law, and is not being afforded an adequate opportunity to secure the services of a lawyer in whom he has confidence and who is competent to meet his particular needs at a price he can afford to pay.

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[1] Group legal service plans have been defined as plans in which "Legal services [are] performed by an attorney for a group of individuals who have a common problem or problems, or who have joined together as a means of best bargaining for a predetermined position, or who have voluntarily formed, or become members of an association with the aim that such association shall perform a service to its members in a particular field or activity, or through common interests it appears that the organization can gain a benefit to the members as a whole." *"Committee Report on Group Legal Services,"* 39 Cal. S.B.J. 639, 661, (1964).

See, e.g. M. Schwartz, *"Foreword: Group Legal Services in Perspective,"* 12 U.C.L.A. L. Rev. 279, 286-295 (1965); J. Carlin and J. Howard, *"Legal Representation and Class Justice,"* 12 U.C.L.A. L. Rev. 381, 386-423, (1965) (collecting and analyzing earlier authorities); *"Committee Report on Group Legal Services," supra,* 39 Cal. S. B.J. at 652-660 (collecting and analyzing earlier authorities); E. Cheatham, *"A Lawyer When Needed: Legal Services for the Middle Classes,"* 63 Col. L. Rev. 973 (1963); E. Koos, "The Family and the Law," (1949); Iowa State Bar Association, "Lay Opinion of Iowa Lawyers" (1949); C. Clark and E. Corstvet, *"The Lawyer and the Public: An A. A. L. S. Survey,"* 47 Yale L.J. 1272 (1938); K. Llewellyn, *"The Bar's Troubles, and Poultices—And Cures?."* 5 Law and Contemp. Prob. 104 (1938). As the *"Committee Report on Group Legal Services," supra,* 39 Cal S. B.J. at 652, 659 stated, after analyzing the relevant data:

> "We are persuaded that there is an unfilled public need for legal services; that the public from time to time is confronted with problems for which legal assistance would be on any standard highly desirable but where legal assistance is not obtained."
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> * * * * *
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> "Three indices tend to confirm that the public is not presently being adequately serviced by the legal profession. The growth of unauthorized practice (lay competition) has been a response to a growing need for legal assistance; a need not being met by lawyers. Specialization has been mentioned as a partial remedy but, . . . the bar has been reluctant to accept the stringent safeguards in a certification system that must be innovated in order to make specialization an effective device. Prior surveys of the public have reported a substantial need for legal services."

2. Equally important, as far as the problem presented here is concerned, there is growing evidence that well-to-do individuals, and institutions such as the government and corporations, receive a qualitatively different kind of legal

service than the average working man. Messrs. Carlin and Howard of the Center for the Study of Law and Society of the University of California, Berkeley, state:

> "Lawyers representing lower-class persons tend to be the least competent members of the bar, and those least likely to employ a high level or wide range of technical skills.
>
> "In the highly stratified professional community of the metropolitan bar, for example, the large firms serving wealthy individuals and large corporations claim a lion's share of the best legal talent. . . ."
>
> "Lawyers available to lower-class clients are not only less competent, but whatever legal talents they have are less likely to be employed in handling matters for their poorer clients. In part this is a direct consequence of the fee. Thus, Hubert O'Gorman [*Lawyers and Matrimonial Cases* 61 (1963)] reports that among matrimonial lawyers in New York City (practically all of whom are individual practitioners or in small firms) the size of the fee has considerable impact on the quality of service provided. Not only is the amount of time spent on legal research 'conditioned by the anticipated compensation,' but fees may also 'dictate the strategy and tactics employed in legal representation.'"
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> * * * * *
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> "The quality of service rendered poorer clients is also affected by the non-repeating character of the matters they typically bring to lawyers (such as divorce, criminal, personal injury): this combined with the small fees encourages a mass processing of cases. . . . Moreover, there is ordinarily no desire to go much beyond the case as the client presents it, and such cases are only accepted when there is a clear-cut cause of action. . . ."
>
> "A final significant fact about quality of representation is that lower-class clients are most likely to be provided with remedial service only. If a poor person gets to a lawyer it is generally after the fact—after he has been arrested, after his wages have been garnished, or after his property has been repossessed.

> ". . . In [contrast in] representing [well-to-do] clients lawyers provide a much wider range of services and they are of a more continuous and preventive nature. Such services include: (1) planning and setting up legal arrangements by establishing contractual relationships to effectuate the client's wishes and to insure certain legal advantages, and (2) clarifying and fashioning the law to provide maximum protection of the client's interests by means of lobbying in legislative and administrative agencies, and by presenting carefully worked out legal arguments before various official bodies, including appellate tribunals." Carlin and Howard, *supra*, 12 U.C.L.A. L. Rev. at 384-385 (footnotes omitted.)

3. The scholars who have studied the problem are in general agreement as to the causes of the comparatively inadequate representation available to the typical working man. *See* authorities cited on p 3, *supra*. These causes have been succinctly summarized by the former Solicitor General, Professor Archibald Cox:

> ". . . [T]he unfilled need for legal services would seem to center about two difficulties which it may be impossible to overcome without changes in the organization, or structure, of the legal profession and, incidentally, in some of the canons of ethics.
>
> "'The first difficulty is the inability of individuals to meet the high cost of the legal services that they occasionally require. It is not that fees are too high. Rendering skilled advice requires time and training that deserve adequate compensation. The cost of maintaining law offices is constantly rising. Litigation, especially where investigatory work is necessary, is expensive at best. Paying even modest legal fees puts an almost unbearable burden not only upon the poverty-stricken who obviously cannot bear the cost but also upon millions in low and middle income groups, unless the case happens to be one in which the potential recovery is large enough to merit a contingent fee. With the low and middle income groups the financial problem is not much different from that of hospital or surgical costs, which overwhelmed family after family

before the days of group insurance; the need arises suddenly, the cost is disproportionate to income and no savings have been accumulated against the contingency. This economic segment of society taken as a class, however, can afford to, and should therefore, pay for legal services if some way can be found of spreading and sharing the costs. Indeed, the devising of acceptable methods would seem to offer many advantages for the profession.

"Second, and possibly more important, is the problem of ignorance. The ignorance is of two kinds; first, ignorance of the possibility that legal advice might be helpful and legal remedies may be available; second, distrust of strange lawyers and ignorance as to whether and where reliable legal services can be obtained either without cost or within the limited ability to pay. . . ." A. Cox, *"Poverty and the Legal Profession,"* 54 Ill. B.J. 12, 14-15 (1965).

4. There is a growing consensus that group legal service plans tend to remove the barriers to adequate legal representation noted by Professor Cox. As Professor Murray A. Schwartz, of the U.C.L.A. Law School, and a member of the Group Legal Services Committee of the California State Bar, has noted:

"These group plans tend to perform at least one of three separate functions which can be characterized as public awareness, contacting and economic.

"The *public awareness* function is the utilization of the group to apprise the members of their legal rights and of the general availability of lawyers to vindicate those rights. . . ."

"The *contacting* function is the bringing together of the client and a particular lawyer. . . ."

"The *economic* function relates to the pricing of legal services. A group may affect the price of legal services which any one client pays in two ways. The first is by adoption of an insurance principle, spreading the cost over a large number of potential clients (i.e. the members of the group,) so that the financial burden of the

individual legal service which might otherwise fall on one member is borne by all. All members of the group who are equally likely to be subject to the cost, but those who do not happen to be will, nonetheless, share it. The second way is by increasing the volume of particular kinds of legal services so as to render the handling of any one instance more efficient and thus less costly." Schwartz, *supra*, 12 U.C.L.A. L. Rev. at 285-286.

5. It appears absolutely clear to us that the points made thus far demonstrate that the Illinois courts' prohibition (Pet. 5a-10a) of financial arrangements, embodying an insurance or cost-spreading principle, between an attorney and a group which has formed a non-profit association, such as a labor union, seriously undermines the efforts of working men to provide themselves with effective legal assistance. First, it destroys at least half and probably more of the economic advantages of such plans by requiring each individual to meet the financial difficulties caused by a pressing legal problem entirely on his own, *see* pp. 5-7 *supra*. Moreover, it makes it extremely unlikely that the members of the group will benefit from the preventive legal planning and long range attempts to influence the course of the law that both well-to-do individuals and institutions presently receive by being in the position to retain an attorney, who they know has specialized competence in their area of interest, to look after their affairs, *see* pp. 4-5 *supra*. The extent of the social benefits lost should not be underestimated.

For as Professor Cox has noted:

> ". . . [L]egislatures have passed a maze of measures and the courts have liberalized judge-made rules for the protection of the weak against over-reaching or oppression. Those laws are of little value, however, if the intended beneficiaries are too ignorant to be aware of their rights or too poor to retain an attorney to enforce them." Cox, *supra*, 54 Ill. B.J. at 14.

It is also clear that there is no presently operative alter-

native means available to fill the gap created by the Illinois courts' ruling. The alternative most often mentioned by the Bar is the Lawyer Referral Service, *see* the Petition for Rehearing, pp. 6-7, 10, filed by the ABA in *Brotherhood of Railroad Trainmen* v. *Virginia*, 377 U.S. 1 (1964), but this program does not even purport to make available an insurance or cost-spreading principle. Moreover the limitations of this service are suggested by the 1962 data as to the Bar's support of the plan, which indicates that only 16,000 of the 300,000 practicing lawyers in the country participated, Schwartz, *supra*, 12 U.C.L.A. L. Rev. at 288, and the evidence which indicates that potential clients prefer the recommendations of organized groups to which they belong rather than relying on chance or the assistance of third parties with whom they are not familiar, "*Committee Report on Group Legal Services*," *supra*, 39 Cal. S.B.J. at 665, 672. The other logical alternative is prepaid legal insurance open to anyone qualified to buy a policy. The difficulty with this alternative is succinctly noted by the "*Committee Report on Group Legal Services*," *supra*, 39 Cal. S.B.J. at 720:

> ". . . [T]hree articles are about the only written expressions in the area of prepaid legal insurance. Each article stresses how little is known of the need for such insurance. A corollary problem also exists; how much of a premium could be charged? It can not be so high as to be prohibitive but, conversely, it must be actuarially sound so as to enable the promoters of any such plan to remain solvent.
>
> "This Committee has actively debated and considered the subject of prepaid legal insurance. Actuarial studies are badly needed if any such insurance plans can be successful. Through its secretary and members, this Committee has corresponded with and spoken to many experts in the insurance and actuarial fields.
>
> "The response of those in the insurance field was uniform; it was decidedly unenthusiastic. No insurance

company has been found which was interested in either the development or sale of such a plan."

In short the situation is this—if the decision of the court below stands, truly effective legal services to meet the complex and growing legal needs of the average worker will continue to be largely unavailable.

6. The Illinois courts concluded that the advantages of group legal service plans which incorporate an insurance or cost-spreading principle were outweighed by what they perceived to be a possible threat to the attorney-client relationship brought about by conflicts between the individual member's interest and that of the group (Pet. 9a-10a). With all due respect, we submit that the courts below gave undue weight to this possibility.

First, it seems extremely unlikely that there is any appreciable danger that an attorney employed by a non-profit association will attempt to sacrifice the interest of a voting member of the group to further that of the association. For the members of the group will continue to assess themselves to pay his fee only if they are convinced that the attorney they employ has their individual interests at heart and that they will be well served by the plan when they make use of it. It is unlikely that they would vote to continue it if they had reason to believe that the personal interests of the individuals who support the plan including themselves were being submerged. For this reason it has been widely recognized by commentators that the fears of the Illinois courts are unwarranted, *e.g.*, H. Weihofer, *"Practice of Law by Non-Pecuniary Corporations: A Social Utility,"* 2 U. Chi. L. Rev. 119 (1934); *"Practice of Law by Lay Organizations Providing the Services of Attorneys"* 72 Harv. L. Rev. 1334, 1344 (1959); *"Group Legal Services,"* 79 Harv. L. Rev. 416, 420 (1965). Indeed the very fact that the decision below excepted legal aid to the in-

digent from the sweep of its prohibition (Pet. 9a-10a) indicates that it fell into error by concluding that personal payment of the attorney's fee is the *sine qua non* of a properly functioning attorney-client relationship.

Second, the courts below failed to recognize that there are regulatory devices compatible with group legal service plans which could be employed to guarantee that the attorney-client relationship is not destroyed by group payment of the attorney's fee. For example, it might well be permissible for a State to require that group plans contain an explicit statement such as the one contained in the plan here that the attorney's "obligations and relations will be to and with only the several persons he represents." (Pet. 7) and to take steps to insure that this undertaking is observed.

Finally, the reasoning of the decision below is flatly inconsistent with that of this Court's decision in *Brotherhood of Railroad Trainmen* v. Virginia 377 U.S. 1 (1964) for we can conceive of no logical train of thought to support the conclusion that the Mine Workers Plan gives group interest greater scope to prevail over individual interests than does the Trainmen's plan. Thus the Illinois courts failed to give proper weight to the fact that this Court had already weighed the factor of possible conflicts between the individual and the group and found it insufficient to overcome the constitutional right of workers "to associate together to help one another to preserve and enforce [their] rights . . ." *Trainmen's Case, supra,* 377 U.S. at 8, *see also N.A.A.C.P.* v. *Button* 371 U.S. 415 (1963).

CONCLUSION

For the foregoing reasons, as well as those stated in the

petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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